

DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI
Student Body v. Board of Trustees, et al.

Correspondence

Correspondence - *Faneva v. United States, et
al*

144-41-489

11, 851

**Director
Federal Bureau of Investigation**

November 18, 1962

**Burke Marshall
Assistant Attorney General
Civil Rights Division**

**DM:SD:ccj
144-62-699**

**Cyril T. Farnes, Jr. v. United
States, et al.**

NOV 18 1962

On November 1, 1962 Cyril Farnes, Jr. filed an action in the Southern District of Mississippi against the United States of America and Deputy Attorney General, Nicholas Katzenbach and James P. Maloney, as well as other unnamed Deputy U.S. Marshals. The gist of the complaint was that the marshals wrongfully and intentionally injured the plaintiff by firing tear gas projectiles at or near him.

In connection with this litigation it may be necessary to establish by photographs and other physical evidence the sequence of events during September 30 and October 1. In addition to determining the sequence of events it may be necessary to have available for presentation fair and accurate descriptions of the situation at the University of Mississippi from the time that the marshals arrived on Sunday afternoon, September 30, until the military arrived early on the morning of the 1st of October. An effective way to establish conclusively what the situation was on the campus of any particular time is through the necessity of photographs taken at the time by persons at the scene. It is possible through the use of the photographs to have the photographer identify the time that the picture was taken or to show the picture to one or more persons who are portrayed in the picture and obtain from them a positive statement as to the time that the picture was taken. In some instances a clock in the picture itself will portray the time that the picture was taken. For example, I have a picture before me taken by a "Life Magazine" photographer of a scene in front of the Lyman Building. The clock on the building shows the time to be 4:25 and it is clear from the scene itself that this was taken on Sunday afternoon after the marshals had arrived on the campus.

**cc: Records
Chrom
Deer
Greene**

**Trial File (1140)
U.S. Attorney**

We know that a number of major publications, including "Life", "Time Week", "U.S. News & World Report", and a number of television networks, had extensive pictorial coverage of these events.

Will you therefore please undertake to obtain suitable 8"x10" prints of all available photographs from all readily available sources taken from noon September 20, 1962, to noon October 1, 1962 at or near the campus at Oxford. When you submit your report to us please have the photographs assembled chronologically with an explanation of the time that the picture was taken and a short statement of what the picture shows, as well as the identity of the witness who can establish the time.

If you are unable to determine the time exactly, please furnish the photograph anyway in a separate subdivision of your report.

We are also interested in obtaining all photographs taken at the following times and places indicated below with the same information attached to your report:

1. Oxford, Mississippi, on September 20, 1962, this being the date of James Meredith's first attempt to register;

2. Jackson, Mississippi, on September 23, 1962, this being the date on which an unsuccessful attempt was made to serve Governor Barnett with a court order and, at the same time, to register Meredith;

3. Oxford, Mississippi, on September 24, 1962, this being the date of the next attempt to register Meredith;

4. Oxford, Mississippi, on September 27, 1962, this being the date on which a crowd gathered in anticipation of another attempt to register Meredith.

If you have any question about this assignment, please contact Mr. John Rusk or Mr. St. John Barrett of my Division.

Thank you.

In connection with carrying out this request if it is not feasible for you to quickly determine the time and place of the photograph, please furnish the photograph anyway for inspection by us. This will greatly reduce the number of photographs where time and effort will have to be spent in establishing when the picture was taken.

Since dictating this memorandum the Department has been instructed by the Circuit Court of Appeals for the Fifth Circuit to institute and prosecute criminal contempt proceedings against Ross R. Barnett and Paul E. Johnson.

The information which you furnish in connection with this memorandum will be used in connection with that prosecution as well.

November 13, 1963

D:O:1002
140-41-489
11031

Honorable Robert H. Hauberg
United States Attorney
Jackson, Mississippi

Re: Fagan v. United States
No. 2604

Dear Mr. Hauberg:

I have inclosed a proposed order in connection with the rulings of Judge Cox on Saturday. I talked to Ed Cates, and understand he is also submitting an order. I would appreciate your submitting the original of this order to Judge Cox and you can represent to him that I mailed to Mr. Cates, this date, a copy of our proposed order.

The item in the order with respect to costs is an item which I think we should insist upon. Since the plaintiff is requiring Mr. Estenbach and Mr. Hobbs to come to Oxford we think their expenses should be paid. Mr. Cates has tendered in connection with the subpoena duces tecum travel and per diem amounting to \$125.00 per person. Inasmuch as this tender was in connection with the duces tecum which has not been ruled on, we do not intend to use it unless covered by court order imposing the costs of taking the deposition on the plaintiff.

Kindly send me a copy of Mr. Cates' proposed order.

cc: Records

Chrono

Four

Putnel

Trial File(Rn. ✓
1140)

Sincerely,

D. ROBERT GALT
Attorney
Civil Rights Division

November 13, 1963

DRG:ach
144-61-489
11851

Mr. Edward L. Cates
Post Office Box 2083
Jackson, Mississippi

Re: Farago v. United States
No. 2004

Dear Mr. Cates:

This is a copy of a proposed order in
this case which I sent to Mr. Emsberg to present
to Judge Cox.

Sincerely,

D. ROBERT GWIN
Attorney
Civil Rights Division

Enclosure

cc: Records
Chrono
Bear
Futuel
Trial File(Rm. 1140) ✓

Carl Hardley
Director of Litigation
Civil Division

November 23, 1962

John Dear
First Assistant
Civil Rights Division
Panoca v. United States, et al

Enclosed is a summons and complaint which
was received by Mr. McShane in the mail.

Nicholas deB. Katzenbach
Deputy Attorney General

November 21, 1962

JD:lvw

John Bear
First Assistant
Civil Rights Division

Chronology of Events on September 30, 1962, Oxford,
Mississippi

Attached is a Chronology from 1:00 p.m. to 8:00 p.m. on September 30. I have delivered copies to Messrs. Oberdorfer, Schlei, Guthman, Dolan, Reiss and Markham, and have asked them to correct or fill in their chronology where they can.

There are three things that I wish to call to your attention:

(1) There are indications that Yarbrough had already called off the state police during the time that he was conferring with you in Clegg's office. The FBI monitoring the state highway patrol radio reported this to our base radio. Some witnesses report that the state police seemed to have thinned out between 7:00 and 8:00 p.m. in front of the Lyceum. The pictures that I have studied seem to indicate that the police had thinned out. Any information that we can gather on this seems to me to be important.

(2) I do not have a clear picture of the time of arrival of all of the marshals, border patrolmen and prison guards at Oxford nor their movement from the airport to the University. I think we should be clear on this.

(3) I understood that on Friday a plan was developed for entering the University if resistance was encountered. I have been unable to locate that plan.

Moore, Gerdorfer, Schiel, Deian,
Kels and Mathews

November 21, 1963

JD:svr

John Deay
First Assistant
Civil Rights Division

Chronology of Events on September 20, 1963, Oxford,
Mississippi

Attached is a Chronology of some of the events from 1:00 p.m. to 8:00 p.m. on September 20. Please check this over to see if there are any inaccuracies or if you can add any details. Your statement is attached and if you were present at any conversations with University officials or State Highway officials, please be especially sure to check your statement to see if you have provided full details of the conversations. If not, please write them out and return them to us. Your statement, if you gave one and I have been able to find it, is attached for this purpose.

There are three things that I wish to call to your attention:

(1) There are indications that Yarbrough had already called all the state police during the time that he was conferring with you in Clegg's office. The FBI monitoring the state highway patrol radio reported this to our base radio. Some witnesses report that the state police seemed to have thinned out between 7:00 and 8:00 p.m. in front of the Lyceum. The pictures that I have studied seem to indicate that the police had thinned out. Any information that we can gather on this seems to us to be important.

(2) I do not have a clear picture of the time, of arrival of all of the marshals, border patrolmen and private guards at Oxford nor their movement from the airport to the University. I think we should be clear on this.

(3) I understood that on Friday a plan was developed for entering the University if resistance was encountered. I have been unable to locate that plan.

Fanera

Louis F. Oberdorfer
Assistant Attorney General
Tax Division

November 21, 1962

John Dear
First Assistant
Civil Rights Division
Oxford, Riot.

I am returning to you Mr. Coppock's summary
of Operation Freeway.

The set of questions that we prepared for
Mr. Katzenbach's deposition is also attached.

United States Department of Justice

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF MISSISSIPPI

Jackson 5, Mississippi

November 23, 1962

To Mr. Doar

AIR MAIL

Department of Justice
Washington 25, D. C.

Attention: Hon. John Doar, Attorney
Civil Rights Division

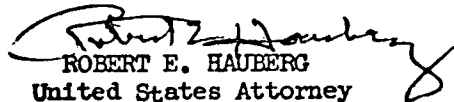
Sir:

Re: Cyril T. Faneca, Jr. vs. United States
et al. - Civil No. 2604, Southern Division

Enclosed is copy of Notice to Parties and Motion
to Grant Reargument upon the Court's Ruling of Novem-
ber 21, 1962.

We are holding a copy for Mr. Carl Eardley who
we understand expects to be here Monday morning.

Respectfully,


ROBERT E. HAUBERG
United States Attorney

Encl.
REH:fmg

Memorandum

*Shirley put in form file
plead*

TO : Mr. Nicholas deB. Katzenbach
Deputy Attorney General

DATE: November 29, 1962

JDG
FROM: Joseph D. Guilfoyle
Acting Assistant Attorney General
Civil Division

JDG:JGL:skh
144-41-489

SUBJECT: Faneca v. United States, et al.
S.D. Mississippi.

Attached hereto is a Motion to Dismiss the above styled case, as it pertains to you and Mr. McShane. A copy of our Memorandum in Support of the Motion is also attached. We propose to have this Motion and Memorandum filed in the District Court on November 30. Copies of the Motion and Memorandum are being forwarded today to the United States Attorney with instructions that they not be filed till he is advised to do so.

Attachments

cc: Mr. Herbert J. Miller, Jr.
Assistant Attorney General
Criminal Division

Enclosures

cc: Mr. Burke Marshall
Assistant Attorney General
Civil Rights Division

Enclosures

*John Down
They are taking
out the
[Signature]*

United States Department of Justice

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF MISSISSIPPI

Jackson 5, Mississippi

November 21, 1962

DOCKETED

NOV 28 1962

#11, 851

Department of Justice
Washington 25, D. C.

Attention: Honorable John Doar, Attorney
Civil Rights Division

Sir:

Re: Cyril T. Faneca, Jr. vs. United States
Civil No. 2604, Southern Division

Enclosed herewith is a certified copy of order signed by
Judge Cox and filed today in the above cause, together with
a copy of ruling.

Respectfully,

ROBERT E. HAUBERG
United States Attorney

Enclosures

By 
E. R. HOLMES, JR.
Assistant

Love

with copy + sent to
Earl F. Fendley

| | |
|-----------------------|----------|
| 144-41-487 | |
| DEPARTMENT OF JUSTICE | RECORDED |
| 30 NOV 24 1962 | |
| RECORDS BRANCH | |
| CIV. RIGHTS DIV. | |
| Gen. Lit. Sec. | |

Faneq

Office Memorandum • UNITED STATES GOVERNMENT

TO : Mr. Burke Marshall
Assistant Attorney General
Civil Rights Division

DATE: December 6, 1962

JDB
SDF

FROM : Joseph D. Guilfoyle
Acting Assistant Attorney General
Civil Division

SUBJECT: Civil Division Daily Report

A copy of this Report is being sent to you because it contains Civil Division's report on yesterday's conference concerning administrative claims arising out of activities at Oxford, Mississippi.

Attachment

John Don -
For your info.
JD

Mr. Marshall

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : The Attorney General

DATE: Dec. 6, 1962

JDG:SDR:jsr

FROM : Joseph D. Guilfoyle
Acting Assistant Attorney General
Civil Division

SUBJECT: Daily Report for Thursday, December 6, 1962.

SOUTH DAKOTA FARMERS DISPUTE

Staff: William P. Arnold. There has been considerable public notice of disturbances in South Dakota over the intended removal of a county office of the Agricultural Stabilization and Conservation Service from Mound City to Herreid, South Dakota. The people of Mound City are resisting such removal and are apparently prepared to resist any efforts of Federal marshals to move the records from their present location.

The Department of Agriculture last year decided to relocate its office. After half of the records had been moved to Herreid, the district court enjoined further movement and directed the State Committee of the Service to re-establish its Mound City office. This order was reversed by the Court of Appeals. Duba v. Schuetzle, 303 F. 2d 570 (C.A. 8, 1962).

The people of Mound City continued to resist efforts to remove the remaining records. The owners of the building have rejected the formal demand of the United States Attorney for the records. Following this rejection, we intended to file in the district court an action in the nature of replevin which would cause the records to become subject to seizure by the marshals. However, filing of this action, or any alternative legal course in aid of obtaining immediate possession of the records, has been delayed until the conclusion of a \$2,000,000 land condemnation suit now pending in the South Dakota District Court. This case is expected to go to the jury on Monday.

In the meantime we have been having conferences with officials of the Department of Agriculture. Members of the General Counsel's office of that Department have now been advised that, before proceeding with our replevin

action, we desire clarification of Secretary Freeman's position with respect to the use of force in securing these records.

CONFERENCE ON CLAIMS ARISING OUT
OF INCIDENTS IN MISSISSIPPI

A conference was held on Wednesday, December 5, 1962, concerning claims for property damage arising out of the activities of the Government in or about Oxford, Mississippi, during the latter part of September, 1962, and the early part of October, 1962. Those present were Messrs. Eardley, Laughlin and Gershuny of the Civil Division, Mr. Doar of the Civil Rights Division, and legal representatives of the Departments of Army and Air Force, the General Accounting Office, and the Federal Aviation Agency.

This conference was held at the request of the Claims Division, Office of the Judge Advocate General, Department of the Army, and had as its primary purpose the determination of the precise legal nature of the situation in Mississippi involving the use of United States Marshals and units of the Army and Air Force to suppress domestic violence and enforce the orders of the United States Courts pursuant to Executive Order No. 11053, September 30, 1962. We were advised that a number of claims had already been filed with the Army by individuals for property damage incurred on or after October 1, 1962. Of the fifteen claims received to date, thirteen have been paid in amounts ranging from \$20 to \$500, one is in the process of being settled, and the remaining claim is disputed. For the most part, these claims represent damage to vehicles or to property used for troop bivouac. These claims were settled both under the Federal Tort Claims Act (28 U.S.C., Section 2672) and under the Military Claims Act (10 U.S.C., Section 2733).

We were also advised of potential claims of the University of Mississippi for damage to its airport caused by the landing of heavy aircraft on inadequate runways and for damage to its buildings and grounds. The amount of these claims is as yet unknown. Mr. Doar has advised that the Civil Rights Division is accumulating, but without taking any action thereon, claims of the University for rental of dormitory rooms and for medical treatment rendered in the University hospital. There is no indication to date that any claims will be filed by either the State of Mississippi or any municipality.

Discussed was the machinery under which such claims would be handled; under the Federal Tort Claims Act where the damage or injury occurred through the negligence of an employee of the Government or a member of the armed services; under the Military Claims Act for property damage or injuries caused by military personnel or civilian employees of the Army acting within the scope of their employment or otherwise incident to non-combat activities (if such claim is not otherwise covered by the Federal Tort Claims Act); under statutory procedures whereby claims arising out of the use and occupancy of real estate can be paid by the General Accounting Office.

It was generally agreed that future claims, of the type paid to date and occurring after domestic violence was suppressed, will continue to be paid. No claim by the State of Mississippi, the City of Oxford and no claim which accrued on September 30, 1962, will be paid without first consulting with the Department of Justice, in order that a determination can be made as to the possible effect of payment on the civil tort action now pending against the United States and Messrs. Katzenbach and McShane.

**Robert S. Resthal, Attorney
Criminal Division**

Dec. 7, 1962

**John Dear
First Assistant
Civil Rights Division**

**JD:stj 11,801
144-41-489**

State of Mississippi v. McShane

Enclosed is a copy of a memorandum which we prepared in connection with defenses for McShane in the criminal case. I had Flannery check this out for me after you left the letter from Assistant U.S. Attorney Prichard.

Burke talked to Jack Miller about it and Jack said that your Division had the same question under study. If so, this may be helpful to you.

There is also enclosed a copy of an FBI request which we have prepared but which has not been sent out, requesting a copy of Judge O'Barr's charge. I would not send it out without getting your approval on it.

Enclosures

FEB 18 1963

File

Typed: Feb. 12, 1963

BM:JHP:scb
144-41-489
11,851

AIR MAIL

Mr. William H. Vaughan, Jr.
Fulbright, Crooker, Freeman,
Estes & Jaworski
Attorneys at Law
Bank of the Southwest Building
Houston, Texas

Re: Fanecca v. United States

Dear Mr. Vaughan:

Yesterday, after you left, Mr. Doar asked me to send to you a copy of the transcript of the deposition given by Marshal McShane in the private suit against him. It is enclosed.

I enjoyed meeting you and I hope to see you again.

Very truly yours,

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

By:
J. HAROLD FLANNERY
Attorney

Enclosure

cc Records
Chreno
Mr. Doar ✓
Mr. Putzel
Mr. Owen (1136)

~~Nick f
Went thru stuff to
go through me
I believe I had you
to see with for my
signature~~

DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

STATEMENT OF MEMORANDUM

Civil 3. Jones v. [unclear] et al.

Investigation

Investigation - James W. McShane

144-41-49

11,851

John Dear
First Assistant
Civil Rights Division

12/3/62
JMF:sc
144-41-489
11,851

J. Harold Flannery
Attorney

Mississippi v. McShane; Faneca v. United States, et al.

This memorandum deals with the legal questions you raised on 26 and 27 November about the above cases.

A. Scope of Examination on Deposition.

This issue is governed by Rule 26(b) of the F.R. Civ. P.:

Unless otherwise ordered by the court as provided by Rule 30(b) or (d)^{1/}, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

1/ Rule 30(b) and (d) provides:

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown.

cc Records ()
Chrono
Mr. Putzel
Trial File (2)

The "Notes of Advisory Committee on Amendments to Rules" (28 U.S.C. Federal Rules of Civil Procedure, Rules 17 to 33, pages 289-290) and the "Commentaries" (id., page 294) should be read, although they are too voluminous and discursive for reproduction here. See also 4 Moore's Federal Practice 1062-1183, §§ 26.15 - 26.25 [8].

The best way I can sum up Rule 26(b) is to say that it does not set out certain matters that may be inquired about, but rather, its thrust is that the deponent may be asked anything except: (1) about totally irrelevant matters, (2) about

1/ continued

the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the

privileged matters, and (3) questions that are patently designed solely to annoy and oppress him. Horizons Titanium Corp. v. Horton Co., 290 F.2d 421 425 (C.A.1, 1961): "This rule apparently envisions generally unrestricted access to sources of information, and the courts have so interpreted it."

1. Limitations

(a) Relevance

At pages 1064-1071 of his treatise, Professor Moore indicates that the concept of relevance is much broader in discovery proceedings than at trial because (1) the parties' claims are still somewhat amorphous and relevancy is difficult to assess; (2) part of the purpose of discovery is to frame the issues and the proponent should get the benefit of the doubt because the deponent can exclude the material at trial if it turns out to be irrelevant; (3) the rule states that trial-type inadmissibility (on relevancy grounds as well as hearsay, conclusions, etc.) is not ground for objection if the material sought to be elicited "appears reasonably calculated to lead to the discovery of admissible evidence."

(b) Annoying or Oppressive Questioning

See Rule 30(b)(d), note 1, supra. This limitation is related to relevancy, above, in that the inference that a question is simply annoying would probably be drawn in part from its irrelevancy. However, this limitation usually requires the objector to show that the question is propounded in bad faith. See generally Moore, op. cit. supra, 2023-2044 and 2050-2052.

The applicability of this limitation is not clear, but I think questions to McShane about Dr. Soblen or his demotion by New York Commissioner Kennedy would be permitted because the answers might be relevant to his judgment or prudence. This limitation should be used, however, to block questions about his religion or heritage.

1/ continued

action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(c) Privilege

According to Professor Moore (at page 1085 of Vol. 4), three grounds of privilege may be invoked to deny discovery: (1) self-incrimination; (2) professional privilege, and (3) governmental privilege.^{2/}

Obviously, McShane may plead the 5th Amendment (although not necessarily in the state criminal proceeding), and it is equally obvious that his communications to us and our work product are protected by the professional privilege doctrine.

The notion of governmental privilege presents a more difficult question. See 4 Moore's Federal Practice 1160-1183, §26.25, esp. pp. 1180-1182. See also 2 A Barron and Holtzoff, Federal Practice and Procedure 105-113, §651.1. Governmental privilege is at its narrowest in suits such as those under the Federal Tort Claims Act which (usually) do not involve the Government's regulatory or sovereign functions. To invoke the privilege successfully in cases involving its proprietary functions and where Congress has indicated that the Government should be amenable to ordinary processes, a strong showing must be made that disclosure will adversely affect the public interest.^{3/}

5 U.S.C. 22, as amended in 1958 is the federal house-keeping statute which authorizes the heads of executive departments to prescribe regulations for the governing of the departments and their materials. Pursuant thereto the Attorney General has provided, in Order No. 3229, 28 CFR §51.71:

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any

^{2/} The cases indicate that the marital privilege and the corporate secret process privilege may also be relied upon, but neither is relevant here.

^{3/} Olson Rug Co. v. N.L.R.B., 291 F.2d 655 (C.A. 7, 1961)

officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena duces tecum is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

The courts have held this to mean that, although a subordinate cannot be held in contempt for refusing to divulge information pursuant to his superior's order, the information itself is not undiscoversible unless the superior can show that the data are privileged under traditional standards.

(d) Procedure

Rules 30(b)(6) and 37 lay out the methods for resisting discovery. Under the former, a party or deponent may seek a protective order from the court^{4/} terminating, limiting, or setting down guidelines for the examination. Under Rule 37, the party or deponent simply refuses to answer a question and the proponent then applies to the district court where the deposition is being taken for an order compelling him to answer.

Under either procedure the hearing court passes upon the merits of the deponent's objection and directs him to answer it or not.

The principal differences between the alternative procedures appear to be: (1) Rule 37 specifically exempts the

^{4/} Prior to the examination such orders must be sought from the court where the action is pending. During the examination that court or the one in which the deposition is being taken passes upon the application.

United States from its taxing or expenses provisions and Rule 30(d) does not;^{5/} (2) only Rule 37 contains judgment by default provisions in the event that a party or his agent disobeys an order.^{6/}

B. Cross-Examination of the Deponent

This problem is governed by Rule 26(c) which provides: "Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43(b)."
Rule 43(b) provides:

(b) Scope of Examination and Cross-Examination.
A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

Professor Moore's discussion (at pages 1184-1186 of Vol. 4) concludes (putting it in our context) that, read technically, the rule would allow us to cross-examine McShane only as to matters raised by Cates's examination. This is not disadvantageous, however, for two reasons.^{7/} First, any matters

^{5/} It appears that the United States is liable for 30(d) type expenses. North Atlantic & Gulf S.S. Co., Inc. v. United States, 209 F.2d 487 (C.A. 2, 1954).

^{6/} Of course, Rule 30(b)(d) orders would, upon continued refusal to answer, become a Rule 37 issue.

^{7/} "Thus the only practical effect in discovery examinations of the restriction upon the scope of cross-examination is to prevent the use of leading questions when the interrogation is upon issues which were not the subject matter of the examination in chief, if the deponent is neither an unwilling nor a hostile witness nor an adverse party nor an officer, director or managing agent of a public or private corporation or of a partnership or association which is an adverse party."

that we shall want to clarify or simplify will be in that category because Cates raised them, at least by implication.^{8/} Second, Cates does not make McShane his witness by taking his deposition (Rule 26(f)), so at the same proceeding we can examine McShane on direct without giving a prior notice that we are going to take his deposition.

C. Objections to be Entered.

We should probably not make any relevancy objections (at deposition) because we shall want unlimited cross-examination without having to argue for it to a Mississippi judge.

We may want to object some questions as being annoying and oppressive, but this raises some problems. If Cates withdraws the question and secures a ruling later we shall have been able to correct or modify on cross-examination any misleading statements by McShane immediately after they were made. However, if we seek a protective order during the proceedings or if Cates suspends his examination to secure a ruling, some damaging statements may gain currency before we can scotch them when the depositions are resumed and exclude or clarify them at trial. (A protective order in advance of deposition is next to impossible to secure because courts are loath to assume that irrelevant or oppressive questions will be asked.)

If you concluded that we should avoid this dilemma we can, under Rule 30(b) secure an order that the examination be private, the deposition be sealed, and that no participant shall disclose any part of the proceedings. Unfortunately, this course would not advance our purpose of making McShane's testimony an effective counter-punch to Paneca's allegations and the grand jury's report.

I shall deal with governmental privilege possible objections in a supplemental memo after further research.

D. Was the Provocative Presence of the Marshals at the Lyceum an Unreasonable Act for which McShane is Liable?

If the plaintiff raises this point, his position will be that the marshals should have been removed from the area of the Lyceum when it was decided that Meredith would not be registered on September 30, because their continued presence

^{8/} We may also be able to base an argument on Rule 43(a) which provides that the most liberal applicable admissibility rule, federal or state, shall govern the receipt of evidence. Professor McCormick, Evidence 43, §21, cites Moak v. State, 32 Miss. 405 (1856) for the proposition that Mississippi is one of about ten states that allow unlimited cross-examination.

at McShane's direction was unnecessary, provocative, and proximately caused the riot. Similarly, the use of Negro personnel was inflammatory and unreasonable, and McShane is liable if the decision to use them was his.

It is our position not only that the presence of marshals was factually defensible and therefore reasonable under the circumstances, but that as a matter of law, even the unwise presence of a public officer cannot make him liable for injuring the plaintiff during a riot which ensued on account his presence.^{9/}

Understandably, there appear to be no cases directly in point. However, our argument can be based on established principles of tort law. One is not liable to another in tort unless he breaches a duty to him and the act or omission causes foreseeably an injury. If any necessary element of liability is missing to the extent that no reasonable man could judge it to be present the defendant is not liable as a matter of law.

Foreseeability is perhaps the necessary element most obviously missing. As a matter of law, a peace officer cannot foresee that carrying out his duties -- even when his presence is unnecessary and resented -- will precipitate a riot. If the plaintiff answers that a riot became foreseeable at some point as the crowd grew and became uglier the question becomes what is the reasonable policeman's duty in the circumstances: to suppress the incipient riot or to withdraw? In answering this question two factors must be borne in mind: first, by the time a riot was foreseeable Meredith was at Baxter Hall, and second, a reasonable man could then conclude that the marshals presence anywhere on the campus would be provocative. That being the case, the marshals might prevent a riot at the Lyceum by withdrawing but that might produce a riot wherever else on campus they went or, if they withdrew entirely, the mob might turn its attention to Baxter Hall. In short, a riot was not foreseeable at the outset and therefore it was not negligent for the marshals to remain -- and once a riot became foreseeable they breached no duty to the plaintiff, both as matters of law.

^{9/} This does not consider the related doctrines that the United States is immune from suit under the Federal Tort Claims Act for discretionary acts by its officers and for assault and battery (28 U.S.C. 2680 (a)(h)). Nor does it consider the traditional tort immunity of public officers carrying out their duties. See Prosser, Torts 780, §109. Finally, the plaintiff's contributory negligence, assumption of the risk, "last clear chance" are highly relevant but beyond the scope of this discussion.

There are several other doctrines which can be invoked to defeat the plaintiff's allegation of negligence as a matter of law. See generally Prosser, Torts 79-115, Ch. 4, Defenses To Intentional Interference With Person Or Property. For instance, defendants who are repelling a battery with reasonable force are not liable to third persons injured in the melee. If you wish it I can explore these substantive defense doctrines in a supplemental memo.

B. Scope of Appellate Court Review of Evidence After Conviction.

On appeal from a criminal conviction the sufficiency of the evidence to support the verdict is a question of law which the appellate court will review, 24A C.J.S. 790-792, §1880:

Notwithstanding the foregoing expressions of policy as to noninterference with jury verdicts, the appellate court may examine the record and review the evidence to ascertain whether the verdict of the jury is sustained by sufficient evidence to support a conviction; that is, to appraise the legal value of the evidence or its legal sufficiency; and such a review involves a question of law rather than one of fact. Moreover, it may be the duty of the appellate court to pass on the legal sufficiency of the evidence to support the verdict, and the deliberate opinion and judgment of the appellate court on the questions whether guilt was sufficiently proved may be demanded by the accused (footnotes omitted).

* * * *

The province or function of the appellate court with respect to questions of fact is limited to ascertaining whether under the evidence the jury could reasonably find accused guilty as charged, or whether there is substantial evidence to support the verdict of the jury, taking the view of the evidence most favorable to the prosecution (footnotes omitted). Ibid., 794-95.

* * * *

Similarly, where the case is tried by the court, the rules as to review are the same as though there had been a jury . . . but it is the duty of the reviewing court to revise the determination of the trial judge on questions of fact where . . .

the appellate court reaches a clear conclusion
that the finding and judgment are wrong . . .
Ibid., 810-11.

The federal cases are replete with holdings and dicta in accord
with the foregoing. Baden v. United States, 269 F.2d 75, 79
(C.A. 5, 1959):

It is not our duty to weigh the evidence or to
pass upon the credibility of witnesses. We are
called upon to determine only whether there is
substantial evidence, viewed from its most
favorable aspect to support the jury's verdict.

See also Glosser v. United States, 315 U.S. 60 (1942);
Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397,
400 (C.A. 4, 1958); Small v. United States, 255 F.2d 604,
605 (C.A. 1, 1958).

*Examine Katzenbach
my file -
investigate*

**Subjects for Possible Cross-Examination
of Mr. Katzenbach**

I. Background

1. Has he ever been in the South before?
2. Has he ever been in Mississippi before?
3. What does he know about racial attitudes and traditions in Mississippi?
4. What inquiries did he make about the effect his planned action might have on the local populace?
5. Did he take those attitudes and the likely effect of his actions into account in formulating a plan of action?
6. Did he exclude any planned acts, or modify his planned action in any way, because of its likely effect on the local populace? Specifics.
7. Do you have feelings of antipathy towards the South or the State of Mississippi?
8. Do you live in a segregated neighborhood?
9. Do you have any Negroes working on your staff?
10. Do you believe in forced integration?

II. Experience

1. Has he had any training in handling very large crowds?
2. Has he ever been at the scene of a riot before?

3. What plan or procedure had been worked out in advance of coming for handling a large crowd?
4. Why didn't he have adequate facilities with him for addressing the crowd?
5. Whom did he consult before coming to Oxford about the proper method of controlling a large crowd? What advice was he given? Did he follow that advice? In what respect?

III. Instructions from superiors before arrival

1. What was the first thing he was told to do upon arriving at the campus?
2. With which local officials was he told to consult?
3. Was he told to make a symbolic demonstration of federal invasion of the campus by surrounding the Lyceum or by other acts?
4. Who instructed him on assigned role on the campus?
5. Where on the campus was he told to bring Meredith?
6. Did Mississippi ask for a show of force?

IV. Instructions from superiors while he was at Oxford.

1. With whom was he in contact in Washington on the afternoon and evening of the 30th?
2. Was he told to leave the marshals at the Lyceum even after it became clear that Meredith would not be registered that day? Why? By whom?
3. Was he told to consult with local officials on controlling the crowd?
4. Was he told to leave control of the crowd to local officials?

V. Instructions he issued to subordinates between 3:00 and 3:03 P.M.

1. Was he personally in command throughout this period?
2. Did he stay on the campus throughout this period? If not, at what point did he leave? For what purpose? For how long?
3. What criteria did he use for assessing the mood of the crowd?
4. Did he authorize the use of tear gas? Why?
5. Wasn't the crowd actually receding at the point the tear gas was fired?
6. Why didn't he use standard riot control practices, such as issuing a warning to the crowd that unless it dispersed he would use tear gas?
7. Did he give specific instructions not to injure innocent bystanders by not firing tear gas directly into the crowd? If not, why?
8. Did he consult with local officials about the firing of tear gas before issuing the order? If not, why not?
9. Did he have any Mississippians, or not federal personnel, at the scene giving him information on what was happening?

VI. Instructions he issued to subordinates after 3:00 P.M.

1. Did he issue the order as to each round of tear gas that was fired?
2. Did he order the marshal to fire tear gas canisters directly at the crowd?
3. Was he concerned with the risk of injury to innocent bystanders by the shooting of tear gas directly into the crowd? What precautions did he order?

4. Did he consider and explore the possibility of controlling the crowd through some other means than tear gas? What means? Why weren't these means used?
5. Were the marshals instructed to draw or use firearms at any point? If yes, why? If not, why were they told to carry firearms in the first place?
6. What instructions were given about who was to be detained?
7. What records were kept of each person arrested and the reason for his arrest?
8. When were the records made -- during or after the riot?

VII. What was the chain of command in the Federal Contingent?

- (a) Who was in charge of the Federal contingent?
- (b) Who had the ultimate decision on the use of force?
- (c) What decisions on the use of force were made before the marshals arrived at Oxford? Who made these?

VIII. Miscellaneous

1. Why were 350-400 marshals ordered to deploy in such strength at the most prominent spot on the campus, in an obvious symbol of Yankee conquest of the University?
2. Why were the marshals ordered to remain on guard even after it became clear that Meredith would not be registered on Sunday?

VIII. Miscellaneous(Cont'd)

3. After it became clear that Meredith would not be registered why weren't the marshals ordered to spread in less conspicuous groups or at least in groups less calculated to precipitate a massing of students.
4. Were Negro Federal personnel brought to the campus simply to inflame the local populace?
5. Why was it that no Negro Marshals were brought to the campus, while Negro troops were brought on Sunday night? If there was sufficient opportunity and prescience to weed out Negro Marshals, why not the same for the soldiers?
6. Why were four attempts to register Meredith, without a show of force, made prior to September 30? Was it simply to influence public sentiment by dangling a "red cape"? If the Government was ready to sue real force in the end anyway, why wasn't the same determined effort made earlier? Having heard Governor Barnett's public pronouncements, why did the Government think during four attempts to register Meredith, that less force would be necessary in Mississippi than had been necessary at Little Rock? Or was the final showdown deliberately delayed to provoke an incident?
7. By what authority was anyone seen in the area of the campus arrested the night of September 30-October 1?
8. Why weren't local officials advised at 7:45 p.m. that gas was about to be used? Was the failure to consult with the state law enforcement people part of a deliberate attempt to undermine their authority and to make them ineffective to control the crowd?
- 9/ Why wasn't a real effort made to maintain direct and continuous contact with Governor

VIII. Miscellaneous (Continued)

Barnett himself? Considering the great effort and large sums expended in registering Meredith, wouldn't it have been a prudent move, for example, to have arranged for a direct phone line to his office or home?

10. What justification is there for requiring the state to carry the extra expense of maintaining Meredith, particularly in view of the University's good faith effort now to maintain law and order?

EVENTS

1. Prior to coming to Oxford

- (a) Selection of personnel to come--decision as to Marshals, soldiers--who decided and when. What were required qualifications as to experience, ability, attitude? White, Negro question discussed--Negro Marshals and soldiers.
- (b) What tasks were assigned to what persons--Katzenbach, Doar, Dolan, Guthman, Ray, etc. Where was this done and when--who said what?
- (c) Decision to put Meredith on campus Sunday--who, when, where; who said what?
- (d) Negotiations with Mississippi officials prior to arrival in Oxford. What officials of U.S., Mississippi.
- (e) Discussions with Meredith and N.A.A.C.P. people--where, when, who said what to whom?

2. Arrival at Oxford (4-8)

- (a) Physical situation at airport--how many people--Marshals, spectators, describe attitude of crowd.
- (b) Describe first trip to campus--route taken, length of time, what you did there. Who was with you?
- (c) At campus, negotiations with Clegg--who was present, what was said about registering Meredith and why? Who authorized postponement? Did anyone request change of plans respective marshals. Situation at campus on arrival and departure.
- (d) Return to airport--what's going on there on return. Marshal situation. Conversations and plan of action. Was postponement of Meredith's entry considered? Who made decision not to postpone?

2. Arrival at Oxford (Continued)

- (e) Times of (a) through (d).
- (f) Return to campus--what happened there?
 - (1) Negotiations with Washington
 - (2) Dealings with Yarborough, McLaurin and Birdsong
 - (3) Did you threaten them?
 - (4) Withdrawal of state troopers-- what were respective positions-- who said what?

3. Size and Activities of Crowd at Lyceum

- (a) At 4
- (b) At 5
- (c) at 6
- (d) At 7
- (e) At 8

Also, how much light at various times.

4. Activities of State Patrolmen

- (a) Where were they situated at the various times?
- (b) Did they hold crowd back?
- (c) Did they help students--marshals-- break down activities as to time.
- (d) When did they leave campus and where did they go.
- (e) Monitoring of patrolmen's radio and instructions to leave--how and from when and when did he discuss this?

5. Marshals' Activities

- (a) How many?
- (b) Times of arrival?
- (c) Formation and reason therefor?
- (d) How were they armed?
- (e) What instructions were they given re use of arms and re dealing with crowd?
- (f) Mode of arrival--trucks, drivers, etc.
- (g) Were Marshals there instructed to assist or to supplant state police? Were they prepared to follow instructions of more experienced local police?

6. Decision to surround Lyceum

- (a) When was the decision made and by whom?
- (b) What were the factors considered by you and by the person who made the decision?
- (c) Wasn't it provocative? Wasn't provocation aggravated when you decided Meredith would not be registered?
- (d) Did you consult with local officials as to where to place the marshals, and when? Did they not counsel you against this?
- (e) Wouldn't it have been adequate to bring Meredith-- and the Marshals-- in on Monday, when people would not have had free time to riot?
- (f) What was your plan with respect to Marshals staying there--would they have stayed if there had been no violence?

7. Firing of Marshals at Hose

- (a) Who authorized marshals to use firearms?
- (b) What time was first use of firearms?
- (c) What was provocation?
- (d) How did you personally learn about it?

8. Use of Negro Truck Drivers/Troops During Riot

- (a) Was there a policy decision made as to this? When and by whom?
- (b) Why were Negroes used, in view of certainty this would inflame?
- (c) Why do they continue to be used?
- (d) Was there any disagreement or discussion as to this problem? What was it?
- (e) Was any attempt made to withdraw Negroes after the temper of the crowd had been established? If not, why not?
- (f) Wasn't the use of Negroes unnecessarily inflammatory?

9. Firing of tear gas

- (a) Who authorized the firing of tear gas? At what time?
- (b) What considerations led up to it - what immediate precipitating factors?
- (c) Outline violent events that had happened prior to tear gas firing.
- (d) Was fair warning given to highway patrol?
- (e) What was position of crowd?

10. Treatment of prisoners

- (a) Who made decisions with respect to this matter?
- (b) What were the instructions given?
- (c) Where were prisoners kept?
- (d) How many were there?
- (e) What steps to assure of humane treatment were taken?
- (f) Did you see any atrocities? What did you do about it?
- (g) What steps were taken to identify reasons for taking particular individuals into custody and to avoid arresting the innocent?
- (h) Didn't the marshals in fact arrest people who were simply there watching or demonstrating peacefully?
- (j) Is the government prepared to compensate citizens who were wrongfully arrested?

11. Entrance of Troops onto Campus

- (a) What time did National Guard come?
- (b) What time did Regular Army come?
- (c) Who made the decision?
- (d) What were precipitating causes in each case?
- (e) Why weren't they brought on earlier?

12. Movement of Outsiders onto Campus

- (a) Did U.S. agree to help keep outsiders out? If so, who agreed with whom?
- (b) Did U.S. keep outsiders out?

12. Movement of Outsiders onto Campus (Continued)

- (c) Did Highway Patrol keep outsiders out?
- (d) Whose responsibility was it? If not marshals', what were marshals there for?
- (e) What discussions did U.S. personnel have as to the problems of outsiders? Was matter considered? If so, when, by whom, where and to what effect?